



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Fluid Systems, Inc.
File: B-225880
Date: January 6, 1987

DIGEST

1. A protest to the General Accounting Office (GAO) alleging an impropriety that was apparent on the face of the invitation for bids that is not filed until after bid opening is untimely.
2. Acceptance of low bid which took no exception to the specifications, even though the specifications were incorrect and no bidder could comply with them, is not legally objectionable when no bidder was misled by the specifications, all submitted bids on the same basis, and the government's needs will be met by the product offered.

DECISION

Fluid Systems, Inc. protests that invitation for bids (IFB) No. N00024-84-B-4312, issued by the Department of the Navy for main feed pump lube oil modification kits, was defective because the specifications for a line item component (centrifugal oil separators) required an unobstructed inside drain with a 2-inch diameter although the component is available with only a 1 3/4-inch diameter. At bid opening on July 29, 1986, there were three bids, the lowest of which took no exception to the specifications, while Fluid Systems and the other bidder qualified their bids to indicate that they were offering the component with a 1 3/4-inch drain. Fluid Systems' letter of July 31 to the agency confirmed a telephone call of the same date and contended that the low bidder could not provide the component with the specified 2-inch drain. Fluid Systems protested to the Navy by letter of October 24, 1986; this protest was dismissed as untimely by the Navy in a letter of December 2. Fluid Systems' protest to our Office was received on December 11.

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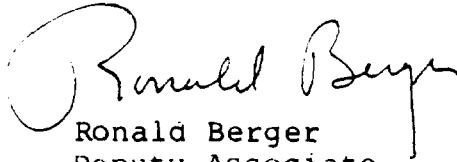
To the extent Fluid Systems contends that the 2-inch drain requirement was improperly included in the specifications as it cannot be met, the protest concerns an impropriety that was apparent on the face of the IFB. As such, under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), the impropriety should have been protested either to the contracting agency or to our Office prior to the bid opening date. Fluid Systems' protest to the agency was therefore untimely, which, under section 21.2(a)(3) of our regulations, also renders its subsequent protest to us untimely. Broderick & Bascom Rope Co., B-224315, Sept. 19, 1986, 86-2 CPD ¶ 326. Although it is true, as Fluid Systems states, that it "spelled out the problem" in its bid, this does not make its protest timely because, even if Fluid Systems' notation in its bid to the effect that it would supply a 1 3/4-inch drain were considered a protest, such protest to the agency would still be untimely as it was not submitted "prior" to bid opening as required by section 21.2(a)(1) of our regulations. Power Test, Inc., B-218123, Apr. 29, 1985, 85-1 CPD ¶ 484. It is well-settled that a protest of an apparent impropriety in a solicitation is untimely where the protest is first submitted with the protester's bid. Id.

Fluid Systems doubts that the low bidder can or intends to provide the product it offered to supply. Since the low bidder did not take any exception to the 2-inch drain requirement, the protester's concern technically is a valid one, as the Navy concedes that the specifications were defective in that only a 1 3/4 inch diameter drain could be furnished with the centrifugal oil separators. Under the circumstances, however, the award is not subject to objection.

In cases where defective specifications are discovered after bid opening, the Federal Acquisition Regulation (FAR) permits a contracting officer to cancel a solicitation. FAR, 48 C.F.R. § 14.404-1(c) (1985). The FAR, however, also provides that the preservation of the integrity of the competitive bidding system dictates that after bid opening award must be made unless there is a compelling reason for not doing so. 48 C.F.R. § 14.404-1(a)(1). We have recognized that the use of inadequate specifications does not itself provide a compelling reason to cancel a solicitation and resolicit--if acceptance of a bid will satisfy the government's needs without prejudice to any bidder, award should be made notwithstanding the deficiency. Dulin Corp., B-207964, Jan. 4, 1983, 83-1 CPD ¶ 7. As none of the bidders here could have supplied a product complying with the specifications and each offered the same product, the bidders obviously competed on an equal basis and the award to the low

bidder was without prejudice to Fluid Systems or the other bidders. Moreover, it is clear that the product offered will meet the needs of the government since the Navy concedes that the specifications were incorrect and that what was offered by all three bidders will meet its needs.

The protest is dismissed.

A handwritten signature in cursive script, reading "Ronald Berger". The signature is written in dark ink and is positioned above the printed name and title.

Ronald Berger
Deputy Associate
General Counsel